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May 30, 1984

Honorable Romano L. Mazzoli
Chairman, Subcommittee on Legislation
Permanent Select Committee on Intelligence
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing in connection with your bill to amend the National Security Act of 1947 to regulate public disclosure of information held by the Central Intelligence Agency (H.R. 5164). You may recall that I testified before your Subcommittee in favor of the central concepts contained in your bill.

I confess now to substantial concern that the legislation is in danger of being submerged in the Subcommittee on Government Information, Justice, and Agriculture of the Committee on Government Operations. I am told that Congressman English has essentially two objections: first, that this is a "bad time" to consider legislation that might be of assistance to the Central Intelligence Agency, and second, more substantively, that it is necessary to attach to the legislation an amendment making clear that the

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Privacy Act is not a (b)(3) exemption to the Freedom of Information Act.

I confess to substantial frustration over the first objection. If your legislation is, as I believe it is, good for our Nation's intelligence effort, it follows that it is also good for our Nation and for all our citizens. I would think that the mammoth effort put into this legislative enterprise so far, and its bipartisan support in Congress would be seen to reflect a solid consensus as to the legislation's wisdom and importance.

The second ground is a little more complicated, as you know. For years it had been the position of the Department of Justice that Congress did not intend by enacting the Privacy Act to create a (b)(3) exemption to the Freedom of Information Act. Given that they were considered and acted upon in such quick succession, it has always seemed to many observers illogical to think that Congress was taking away by enacting the Privacy Act what they purported to be giving with the Freedom of Information Act. The Reagan Administration, however, changed the Department's traditional view, to the apparent irritation of Congressman English. I am told that he now sees the CIA-FOIA reform as a means by which to lever the Department of Justice into reversing its position.

While as a personal matter I disagree with Justice's current position, the Department has taken the position publicly and as a matter of principle. Moreover, the circuits are split on the issue generally and there is a case pending before the Supreme Court that may serve to resolve the dispute in this coming Term. The Justice Department position would be, I suppose, that the Privacy Act issue is not all related to the CIA

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bill, and that in any event the Supreme Court will likely resolve the issue so far as present law is concerned within a few short months.

Whatever the merits of the respective positions, however, it is clear beyond doubt that valuable legislation is in danger of being sacrificed in this battle of principle. After some thought on the subject together with my former colleague from the Justice Department, Bob Saloschin, I have concluded that there may well be a compromise that merits serious consideration. If the Justice Department position is at all tenable, at least in my view, it is to the extent that the FBI would rather not process the large number of applications for documents under the Freedom of Information Act received from convicted felons in federal prisons, or their accomplices outside. If that is, as I believe it to be, the true concern of the Justice Department, it can quite effectively be protected by including in the general provision authored by Congressman English an exception, say, for applications to the FBI from convicted felons. Or, perhaps, the exception could apply to certain designated criminal investigative files of an especially sensitive nature. In any event, at least the core concerns of both Congressman English and the Justice Department could be conserved, and presumably, the CIA legislation then could be allowed to go forward to enactment.

I write you this lengthy letter with apologies because I know how busy you are and how limited your time is. But because you showed such perceptiveness and leadership in drafting the provisions of H.R. 5164, it occurred to me that you might find it valuable to have at your elbow the concept of a compromise possibly useful to break this legislative logjam. I do hope such a compromise will be possible, because I believe

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your bill is an extremely important piece of legislation for the Agency and for the country.

Please let me know if I can be of any further assistance. If the concept of compromise seems useful, I would of course be happy to suggest language for your consideration.

And once again, let me say how much I appreciated the warm hospitality you showed me at the hearings last February. I was very pleased then, as always, to be of assistance to you and to the Subcommittee.

With warm regards.

Sincerely yours,

John H. Shenefield

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bcc: [redacted]
John Norton Moore
Robert Saloschin

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AMERICAN BAR ASSOCIATION

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STATEMENT

of

JOHN H. SHENEFIELD, CHAIR
TASK FORCE ON THE JUSTICE SYSTEM AND NATIONAL SECURITY
STANDING COMMITTEE ON LAW AND NATIONAL SECURITY
AMERICAN BAR ASSOCIATION

before the

SUBCOMMITTEE ON LEGISLATION
OF THE
PERMANENT SELECT COMMITTEE ON INTELLIGENCE
UNITED STATES HOUSE OF REPRESENTATIVES

concerning H.R.3460 and H.R.4431

Disclosure of Intelligence Information

February 8, 1984

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Mr. Chairman and Members of the Committee:

It is an honor to appear here today on behalf of the American Bar Association to address H.R. 3460 and H.R. 4431, bills to amend the National Security Act of 1947 to regulate public disclosure of information held by the Central Intelligence Agency.

These bills address a problem caused by the intersection -- some would say the collision -- of two powerful postulates on which our system of government is based. First, in our democratic society, the most fundamental decisions are made by our citizenry at the ballot box. Those voters must be endowed with the wisdom of educated choice that can come only from the availability of information. But second, and cutting across the need for freely available information, is the fact of life that secrecy is essential to our national security in those narrow areas in which the dangers caused by disclosure outweigh the benefits. The application of the Freedom of Information Act to our intelligence community is the best possible example of one fundamental goal in uneasy tension with another. The task of these bills is to address the problems that have been caused by that tension, and to adjust the competing values.

An informed citizenry is one of our society's highest ideals. The First Amendment to the Constitution is eloquent testimony to the importance we as a Nation place on

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freedom of expression as a prerequisite to the emergence of the truth. Our founding fathers were confident that truth, if given a chance, would prevail in the marketplace of ideas. Much of our public policy is dedicated to ensuring that the competition in the marketplace of ideas is fair and unfettered. Education policy, communications policy, political campaign and contribution laws, the law of libel, and patent policy are only a few examples of decisions by our society to emphasize the importance of making information available, in contrast to other competing values. To these ends, we have always valued a free press, unruly as at times it may be; a diverse academic community, as searching and persistent as it should be; and an inquiring citizenry, as awkward as that can be - all dedicated to ferreting out and publishing facts, even when they embarrass or are uncomfortable or may cause inconvenience, even injury. We have insisted on erring on the side of disclosure.

An important component of our effort as a Nation to be sure that our citizens have access to the facts is the Freedom of Information Act. As enacted originally and then as amended, the Act was designed to improve the access of the public to information about our government. No longer

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was it sufficient for government, in resisting requests for information, simply to rely on vague expressions of reluctance or privileges of uncertain scope. The Congress on behalf of the people had laid out the contours of those narrow categories in which, at least for a time and in the service of some supervening justification, the public could be denied information. Even in those areas, Congress established independent judicial review to ensure that the government lived up to its obligations.

The area of national security should not be a generalized exception to our predisposition in favor of public disclosure of information. Indeed, one essential component of true national security is an informed citizenry and the support that, as a result of education, it gives more confidently to its government. Surely no area of our national life is more important, and in no other area of government activity are the concerns of the public to understand and help make decisions more commendable. In a world in which war, terrorism and intrigue are commonplace, we as Americans not only have a right to know, but the duty to find out, to analyze in a hardheaded fashion and to come to sound conclusions, especially when the implications of those conclusions are grave and the actions called for are

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difficult and momentous. When our sons may be called upon to give their lives to protect the national security, when our cities are held in a strategic balance of terror, when our resources are so completely committed to establish and maintain our defense, there can be no thought that the area of national security is immune from public inspection.

Because we do not live in a benign world, we confront adversaries who do not share our goals nor play by our rules. Information that might be of some relevance in public debate may be the same information that confers a decisive strategic advantage on those who are antagonistic to our ideals, to our interests, indeed to our very existence. It is a matter of common sense, then, that there are areas of our national security that cannot be open to public view and that chief among these are the operational decisions of an effective intelligence service. Moreover, it follows equally that certain essential files of information at the core of the operation of our intelligence service contain information so sensitive that every step must be taken to safeguard it against discovery or release.

Extraordinary steps are in fact taken to protect such information. Classification standards, while recognizing the importance of an informed public,

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nevertheless permit withholding of information in those areas where disclosure could reasonably be expected to cause damage to the national security (E.O. 12356). The organization of the sensitive files in the intelligence community is compartmented so that only those persons with a need to know have access.

It does not follow, however, that there is no legitimate room for public inquiry in the intelligence community. Where intelligence information has been furnished to policy-makers and has formed the basis for important national policy decisions, inquiry - if not always disclosure - is appropriate. Where there are non-trivial allegations of illegality or impropriety, the public has a right to ask questions. Unfortunately, the Freedom of Information Act, as presently structured, does not in the accommodation of these important predicates for public inquiry give sufficient weight to the enormous sensitivity of the central operational files. In an effort to strike a balance appropriate to government across-the-board, the FOIA properly subjects important aspects of the intelligence community to the healthy scrutiny of the American people. But to the extent it requires the search and review of files

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that can in the end never be made public, FOIA in this instance is futile, and possibly even disastrous.

The problem arises in this stark form because the Freedom of Information Act applies fully to the Central Intelligence Agency. A request requires the search and review of literally all files likely to contain responsive information. This can involve the search of over 100 files where a complicated request is made. Information can be refused on the grounds that it is properly classified (Section 552(b)(1)) or that it is specifically exempted from disclosure by statute (Secton 552(b)(3)). In the case of the Central Intelligence Agency, a (b)(3) exemption may be triggered by Section 102(d)(3) of the National Security Act of 1947, providing that the Director of Central Intelligence shall be responsible for protecting the intelligence sources and methods from unauthorized disclosure.

The result of this process is the release on occasion of minute, frequently incomprehensible, disconnected fragments of documents, which are islands of unprotectable material in the vast exempt ocean of classified and sensitive information. What emerges is of marginal value to informed discourse and on occasion,

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because it is out of context, is highly misleading and indeed distorting to scholarly analysis and public debate.

And yet this dubious result is achieved at the price of expenditure of enormously scarce resources. The systems of search, review and confirmatory review necessarily in place in the CIA to avoid release of information that might compromise extremely sensitive operations takes the time not of government clerks, but of intelligence professionals. Furthermore, even with a system of review redundancy, the potential for human error is present. Indeed, there are examples of sensitive material mistakenly released. Moreover, we are told that allied intelligence services and overseas contacts that are the sources of much of the intelligence in our possession are so concerned about the applicability of the Freedom of Information Act to the CIA, from initial request to judical review, that they are increasingly reluctant to put their own lives on the line in the service of our government. In sum, the applicability of the Freedom of Information Act to these sensitive files yields very little information, if any, on the one hand, but it holds the potential for mistaken disclosure, tends to constrict the flow of information, on the other.

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As this problem has become evident in recent years, there has been a series of efforts to deal with it. Differences that exist now concern only the mode of solution. What is clear is that there is a broad consensus that some solution is very much in order. The House of Delegates of the American Bar Association gave voice to that consensus at its 1983 Annual Meeting by passing a resolution in favor of significant relief for the intelligence community from the applicability of the Freedom of Information Act.

Commentators now generally agree that exemption from the Freedom of Information Act should cover only information the release of which is virtually never appropriate. The complete removal of a category of information from the Act should be as narrowly defined as is possible.

In support in principle of both H.R. 3460 and H.R. 4431 as effective solutions that meet this standard, we can say several things. First, they will result in virtually no lessening of the amount of information that has hitherto been available from the intelligence community. Second, they avoid the risk of human error that may result in the fatal compromise of highly sensitive intelligence

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operations. Third, they avoid the dedication of elaborate resources to the essentially futile task of reviewing documents that can in the end never be released in any event, and thus free up intelligence professionals to do the task for which they are best suited. Fourth, they inevitably will reduce the backlog and the litigation over the backlog, so that requests that can be responded to will be addressed in a more timely fashion. And finally, they will reduce the reluctance to cooperate of those abroad who do not fully understand our general system of disclosure of information, and thus they will enhance the effectiveness of our intelligence capability.

While both bills are significant improvements over the status quo, I personally admit to a preference for H.R. 4431. That bill is somewhat more precise in laying out the mechanics by which certain operational files are exempted. Moreover, the scope of judicial review is defined.

Nevertheless, both bills are modest compromises that safeguard the essential central operational files of our intelligence capability at the CIA. They are carefully crafted to avoid an unnecessarily broad exemption from the Act and its underlying policy. They preserve access to

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finished intelligence, information concerning authoritatively acknowledged special activities, studies of intelligence prepared for training purposes, and even raw intelligence supplied to policy-makers in its original form to assist in policy decisions. They avoid closing off access to information concerning illegal or improper intelligence activities. They are astute blends of practical effectiveness that avoid violating an important policy preference in favor of informed public debate.

In short, on behalf of the American Bar Association, I support in principle both bills, although with a slight preference for H.R. 4431. I do so because I believe that in this narrow instance, an exception to our general rule of access to information about our government is thoroughly justifiable. I do so because here the balance in favor of secrecy overwhelms the theoretical benefit of access to sensitive information that can never in the end be released. I do so in the firm belief that in this small area, secrecy must be preserved, so that we do not unnecessarily jeopardize the security of our democratic institutions that make this entire issue of such importance. This Nation, which gains so much strength from the debate of an informed citizenry, can in this instance protect that

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strength most effectively by imposing the discipline of secrecy on the operational files of the Central Intelligence Agency. Both bills under consideration here successfully mediate that policy tension and either deserves speedy enactment.

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